Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

SABRI I. SAMIRAH,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; CYNTHIA J. O'CONNELL, INTERIM DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

CHARLES ROTH
MIDWEST IMMIGRANT AND HUMAN RIGHTS CENTER
208 South LaSalle Street
Suite #1818
Chicago, Illinois 60604
(312) 660-1613

MARK A. FLESSNER
Counsel of Record
CARIN S. RIEKES
DAVID B. SINGER
CHRISTOPHER A. WALLACE
SONNENSCHEIN NATH & ROSENTHAL LLP
8000 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-8000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that § 1252(a)(2)(B) precludes jurisdiction over pure constitutional and statutory claims challenging the government's interpretation of 8 U.S.C. § 1225A, where no other route of appeal is possible?

2. Did the Court of Appeals err in finding that an individual excluded from the United States in violation of the statute and the Constitution is not in custody for purposes of a writ of habeas corpus?

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The order of the Seventh Circuit Court of Appeals denying rehearing en banc (App. C, *infra*, 16a) is unreported. The opinion of the Seventh Circuit Court of Appeals, *Samirah v. O'Connell*, (App. A, *infra*, 1a-12a) reversing the district court's grant of a preliminary injunction is reported at 335 F.3d 545 (7th Cir. 2003).[1] The order of the District Court for the Northern District of Illinois granting a preliminary injunction, *Samirah v. Ashcroft, et. al.*, No. 03-C-1298, slip op. (N.D. Ill. March 25, 2003) (App. D, *infra*, 17a) is unreported. The transcript of the proceedings before the district judge contain the opinion granting petitioner a preliminary injunction and are included herein at App. E, *infra*, 18a-28a.

JURISDICTION

On July 2, 2003, the Seventh Circuit Court of Appeals entered an order reversing the preliminary injunction entered in this case by the district court on March 25, 2003. Dr. Samirah filed a timely Motion for Rehearing and Suggestion for Rehearing En Banc. On October 30, 2003, the Court of Appeals denied that motion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the Constitution is reproduced verbatim at App. I, *infra*, 42a. The Fifth Amendment of the Constitution is reproduced verbatim at App. I, *infra*, 43a. The Fourteenth Amendment of the Constitution is reproduced verbatim at App. I, *infra*, 44a-45a.

The following provisions of the United States Code: 8 U.S.C. §§ 1225, 1225a, 1228, 1229a, 1229b, 1252; 28

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[1] For purposes of this petition, petitioner's cites to Appendix A for references to the 7th Circuit's opinion in *Samirah v. O'Connell*.

U.S.C. § 1254 are reproduced in the appendices at App. J, *infra*, 60a-99a.

The following provisions of the Code of Federal Regulations: 8 C.F.R. §§ 1.1, 245.2, 245.6 are reproduced in the appendices at App. J, *infra*, 100a-112a.

STATEMENT OF THE CASE

Sabri Ibrahim Samirah, a citizen of Jordan, has lived in this country for the past fifteen years. App. E, *infra*, 19a. Since coming to the United States in 1987, he has earned two graduate degrees and has been a prominent figure in the Muslim and Arab American communities. Dr. Samirah and his family were domiciled in Orland Park, Illinois. His wife, Mrs. Sima Srouri, taught Arabic and Islamic studies at Universal School in Bridgeview, Illinois. The couple has three sons, ages twelve, ten, and three, who are United States citizens. *See* App. E, *infra*, 21a.

In September 2002, Dr. Samirah and his wife, through their immigration attorney, filed an application for Adjustment of Status to that of a Legal Permanent Resident of the United States (LPR). Dr. Samirah was eligible to apply for Adjustment of Status because the INS had approved an immigrant petition filed by his wife's employer. Dr. Samirah was permitted to apply as a "derivative" applicant, meaning that his ability to obtain LPR status was conditioned on his wife actually obtaining LPR status through her employer. *See* INA § 203(d), 8 U.S.C. § 1153(d); App. J, *infra*, 46a, 58a.

At the same time, Dr. Samirah also filed Form I-131, Application for Advance Parole, for the purpose of traveling to Jordan to visit his ill mother. During the pendency of the application for Adjustment of Status, an applicant is permitted to travel outside the United States only with such advance authorization; any other travel results in the Adjustment application being considered "abandoned." *See* 8 C.F.R. § 245.2(a)(4)(ii)(B); App. J, *infra*, 104a-108a. On

December 4, 2002, the government granted Dr. Samirah's Application for Advance Parole, and accordingly the government issued an advance parole document (Form I-512L) to Dr. Samirah. *See* App. G, *infra*, 30a-31a.

Dr. Samirah departed the United States on December 28, 2002, with his I-512L form in hand. It states that he will be allowed to resume his application for Adjustment of Status unless found inadmissible under applicable immigration laws and regulations:

> NOTICE TO APPLICANT: Presentation of this authorization will permit you to resume your application for adjustment of status upon your return to the United States, if otherwise admissible under the Act. If your adjustment application is denied, you may be subject to removal proceedings under sections 235(b)(1) or 240 of the Act.

Id. Sometime after Dr. Samirah departed from the United States, the government learned that Dr. Samirah was not in the United States and decided to revoke his advance parole before he could return. During Dr. Samirah's return trip home from Jordan he was stopped for a layover in Shannon, Ireland. There Dr. Samirah met with INS officials at an INS preinspection station. The officials presented Dr. Samirah with a copy of a two-sentence fax, signed one day earlier by Brian Perryman, Chicago District Director of INS. *See* App. F, *infra*, 29a. This document informed Dr. Samirah that the district director had revoked Dr. Samirah's advance parole, stating that "the INS has received information indicating that you are a security risk to the United States and therefore, your advance parole authorization is hereby revoked." *Id.* INS officials then denied Dr. Samirah reentry into the United States, preventing Dr. Samirah from going home to be with his wife and his sons.

On February 20, 2003, Dr. Samirah filed a Complaint against John Ashcroft, Attorney General of the United States,

Brian Perryman, as Chicago District Director, Immigration and Naturalization Service,[2] the Immigration and Naturalization Service, and the United States Department of Justice (referred to collectively herein as "defendants", "government" or "INS"). He sought declaratory and injunctive relief against the defendants for their continued refusal to follow the procedures outlined in the Immigration and Nationality Act ("INA") and their own administrative regulations. The next day, February 21, 2003, Dr. Samirah filed a Motion for Preliminary Injunction and Request for a Hearing seeking to have the case adjudicated in an expedited fashion so that Dr. Samirah could be back in the United States before March 28, 2003.[3] At a hearing on February 25, 2003, the government indicated that it would move to dismiss on jurisdictional grounds, and that it saw no need to decide the case before March 28, 2003; the district court ordered the government to address both the jurisdictional issues and the effects of Dr. Samirah's absence from the country past March 28, 2003. On March 11, 2003, the government filed a Motion to Dismiss Complaint and Petition For Writ of Habeas Corpus and Memorandum in Support. On March 18, 2003, Dr. Samirah filed his Response. At a hearing on March 20, 2003, the government represented that the ninety-day reentry window could not be waived. The court therefore ordered the

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[2] Since the filing of the Complaint, Mr. Perryman has resigned his position as district director. Further, on March 1, 2003, the Immigration and Naturalization Service became part of the Department of Homeland Security with a new name, the Bureau of Immigration & Customs Enforcement.

[3] March 28, 2003, was a crucial date by which Dr. Samirah needed to return because, had he been prevented from returning, he would have been outside the United States for more than ninety days and lost rights under 8 U.S.C. § 1229b(d)(2). *See* App. J, *infra*, 94a. In granting the government's Motion for Stay Pending Appeal, the Court of Appeals held that the ninety-day requirement of 8 U.S.C. § 1229b(d)(2) was equitably tolled. *See* App. B, *infra*, 14a.

government to respond to any and all issues by March 24, 2003, and informed the parties that it intended to render a decision on the preliminary injunction request on March 25, 2003. On March 24, 2003, the government filed its Reply to Dr. Samirah's Response.

On March 25, 2003, the district court granted Dr. Samirah's motion for preliminary injunction and ordered the defendants to arrange for the issuance of any and all documents necessary to permit Sabri Samirah to enter the United States on or before March 28, 2003. *See* App. D, *infra*, 17a. The next day, the government filed an Emergency Motion for Stay Pending Appeal and Notice of Emergency Appeal with the Seventh Circuit Court of Appeals, and Dr. Samirah filed a Motion in Opposition to Stay of Enforcement of the district court's order. Later that day, the Court of Appeals granted the government's Motion for Stay Pending Appeal, but "construed [the government's motion] as a government waiver of the 90 day period of 8 U.S.C. § 1229b(d)(2)," (App. B, *infra*, 14a), meaning that if Dr. Samirah prevailed, he would be held harmless from the resulting additional time outside the country.

After expedited briefing, the case was set for argument on June 5, 2003. The Seventh Circuit issued a published decision on July 2, 2003, reversing the decision of the district court, and finding that the federal courts entirely lacked jurisdiction over the cause of action. *See* App. A, infra, 1a-12a. Dr. Samirah filed a timely Motion for Rehearing and Suggestion for Rehearing En Banc on July 15, 2003, which was denied without opinion on October 30, 2003. *See* App. C, *infra*, 16a.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S HOLDING THAT 8 U.S.C. § 1252(A)(2)(B) PRECLUDES REVIEW OF STATUTORY AND CONSTITUTIONAL CLAIMS GOES AGAINST THE WEIGHT OF JUDICIAL AUTHORITY, CREATING A CIRCUIT SPLIT.

In proceedings below, the district court determined that the agency had violated Dr. Samirah's constitutional rights by excluding him without process. The court found that Dr. Samirah's fifteen years of lawful presence in the United States entitled him to the protections of the Constitution: "[T]he government cannot short-circuit the rights of an alien who has long lived in the United States by revoking his parole and then treating him as if he had never been here at all." App. E, *infra*, 23a-24a. The court held that Dr. Samirah is entitled to the right of due process, consisting of notice and a hearing, prior to being excluded from this country.

The district court therefore found it unnecessary to address Dr. Samirah's statutory claims that Congress had not authorized the exclusion of aliens except by the provisions set forth in the statute. Dr. Samirah clearly was not challenging the discretionary action of the government to revoke his parole. Indeed, Dr. Samirah's primary challenge has been to the government's act of excluding him without a hearing, which is separate and independent from his advance parole. He challenged the advance parole revocation only to the extent that the court upheld his exclusion as flowing automatically from that revocation, and then only to the extent that it was barred by the Constitution.

The Seventh Circuit declined to address any of Dr. Samirah's statutory or constitutional claims. The Court of Appeals held instead that 8 U.S.C. § 1252(a)(2)(B) barred the district court from addressing any claims, including purely constitutional and statutory claims. *See Samirah v.*

O'Connell, 335 F.3d 545, 552 (7th Cir. 2003); App. A, *infra*, 12a. The Court's blanket preclusion of judicial review constitutes an unprecedented situation in which the courts are barred from protecting constitutional rights. Dr. Samirah is not challenging the government's discretionary actions; rather, his claims address a deprivation of due process, and he therefore asks this Court to examine the means by which he was excluded. Declining to address these substantial constitutional and statutory questions on the merits, the Seventh Circuit held *sub silentio* that § 1252(a)(2)(B) could preclude all review of these decisions. This decision is at odds with the weight of authority considering this issue.

Prior to *Samirah*, the Seventh Circuit addressed the effects of § 1252(a)(2)(B) in a number of cases and always interpreted the statute to permit review of constitutional questions and questions of pure law. *See Kharkhan v. Ashcroft*, 336 F.3d 601, 604-606 (7th Cir. 2003) (finding jurisdiction over plaintiff's due process claims); *Ahmed v. Dept. of Homeland Security*, 328 F.3d 383, 386-87 (7th Cir. 2003) (rejecting mandamus claim on merits rather than lack of subject-matter jurisdiction under § 1252(a)(2)(B)); *Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002) (permitting mandamus action). In *Iddir*, the Court of Appeals applied traditional tools of statutory construction and held that use of the terms "judgment" and "decision or action" only bars review of discretionary decisions specifically denying or granting relief, not barring review of constitutional or statutory challenges. *Iddir*, 301 F.3d at 497. This prior approach of the Seventh Circuit was consistent with the approach of the Supreme Court and the other circuits to address this question. The decision in *Samirah* rejects this interpretation and creates a circuit court split on this matter.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court considered an argument that § 1252(a)(2)(B) barred its consideration of the Attorney General's release determination. The Court disagreed: "[t]he aliens here . . . do not seek

review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority . . . [a]nd the extent of that authority is not a matter of discretion." *Id.* at 688. There is no indication that this Court's holding regarding § 1252(a)(2)(B) was limited to the habeas context. Like the plaintiffs in *Zadvydas*, Dr. Samirah does not challenge the Attorney General's discretion to exclude him from the country; he challenges the constitutionality of this discretion to the extent it violates due process by excluding him without notice and a chance to be heard.

Aside from this Court, this matter has been addressed by the Second, Third, Fifth, Ninth, Tenth and Eleventh Circuits. All have held that § 1252(a)(2)(B) does not preclude jurisdiction over statutory or constitutional claims. *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 217 (5th Cir. 2003) (reviewing the due process claims on the merits, holding that the court has jurisdiction to review an issue of statutory interpretation); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 178 (3rd Cir. 2003) (holding that § 1252(a)(2)(B) removes jurisdiction for denials of discretionary relief only); *Nolan v. Holmes*, 334 F.3d 189, 194 (2nd Cir. 2003) (holding that review of a purely legal challenge is not precluded by § 1252(a)(2)(B)); *Gonzalez-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1333 (11th Cir. 2003) (stating, "[n]otwithstanding this jurisdictional bar . . . § 1252(a)(2)(B) allows review of substantial constitutional challenges to the INA"); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002) (allowing review of a statutory interpretation challenge as a pure question of law not subject to § 1252(a)(2)(B) preclusion); *Sierra v. INS*, 258 F.3d 1213, 1217 (10th Cir. 2001) (holding that review of constitutional challenges is not precluded under § 1252(a)(2)(B)).

The government clearly has the right to make discretionary decisions regarding the exclusion or removal of aliens, and the courts rightfully must pay deference to that discretion. But Dr. Samirah, like the plaintiff in *Sierra*, is challenging the

constitutionality of the government's procedures or lack thereof in making these discretionary decisions. "It is never within the Attorney General's discretion to act unconstitutionally." *Sierra*, 258 F.3d at 1217. Denial of notice and a hearing before exclusion violates Dr. Samirah's due process rights and is therefore unconstitutional.

Dr. Samirah is asking this Court to maintain precedent created and upheld by it and the circuit courts. The circuit courts addressing this issue have interpreted § 1252(a)(2)(B) narrowly and consistently with the strong presumption in favor of judicial review.

> We read § 1252(a)(2)(B)(i)'s language narrowly, construing any ambiguities in its language in favor of Ramirez-Perez and in favor of judicial review. Whether the BIA's interpretation of the hardship standard violates due process is not a "judgment regarding the granting of" cancellation of removal relief. Rather, it presents a question of statutory construction. Thus, we conclude that § 1252(a)(2)(B)(i) does not preclude our review of Ramirez-Perez's constitutional claim.

Ramirez-Perez v. Ashcroft, 336 F.3d 1001, 1005 (9th Cir. 2003) (reaching statutory and constitutional claims relating to hardship prong of cancellation case) (citations omitted).

The Seventh Circuit's decision clearly conflicts with the overwhelming weight of judicial authority, which holds that § 1252(a)(2)(B) precludes jurisdiction only over challenges to discretionary determinations and not over statutory or constitutional challenges. There is a presumption in favor of judicial review of constitutional claims and it is "distasteful to suppose that an administrative agency would claim to receive from Congress . . . a license to ignore the Constitution." *Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1442 (7th Cir. 1996) (stating that door-closing statutes are often interpreted as being inapplicable to constitutional challenges). The Seventh Circuit decision creates a circuit split on this issue.

The Supreme Court is the only appropriate body to resolve this conflict.

II. DR. SAMIRAH'S EXCLUSION FROM THE UNITED STATES VIOLATES DUE PROCESS.

The Constitution secures the right to procedural due process where government action deprives individuals of life, liberty, or property. U.S. Const. Amend. V, XIV. The fundamental tenet of due process is the right to a hearing of some kind, dependent upon the careful balance of three factors: the liberty interest involved, the utility of additional procedures in facilitating justice, and the burden imposed upon the government. *See Mathews v. Eldridge*, 424 U.S. 319, 332-333 (1976). In *Eldridge* the Court articulated this balancing approach:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

Dr. Samirah has been exiled from his home in the United States for over one year, never having received a hearing as to the subject of his exclusion or basis for the government's refusal to allow him to return to this country. Irrespective of the government's authority unilaterally to revoke a decision to grant advanced parole, Dr. Samirah cannot be deprived of his residence in the United States without some process through which he may be heard in his defense. He has developed "the ties that go with permanent residence" that afford him constitutional protections beyond those of an alien seeking "initial admission." *See Landon v. Plasencia*, 459

U.S. 21, 32-33 (1982). Consequently, he has a substantial liberty interest in returning to the United States. *Id.; see also Reno v. Flores*, 507 U.S. 292, 306 (1993); *Chin Yow v. U.S.*, 208 U.S. 8, 13 (1908) (establishing the right to a fundamentally fair hearing in exclusion proceedings); *The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903); (establishing a right to due process in deportation proceedings). The government's unilateral exclusion of Dr. Samirah, aptly termed by the district court as a "short-circuit" of his rights, clearly deprives him of this liberty interest. As such, his due process rights have been violated, and he is entitled to a hearing through which he may challenge the actions of this government to ensure that he is not "treated as if he had never been here at all." *See* App. E, *infra*, 24a.

Dr. Samirah was following the necessary procedures that would lead him to an official Adjustment of Status. He left the United States with the permission of the government and under the expectation that he could return to the United States and retain his place in the adjustment process.[4] The government precluded Dr. Samirah from returning to his home and family and has caused him to lose his place in the adjustment process. Dr. Samirah's status remains essentially in administrative limbo. The government's action cannot withstand constitutional scrutiny; it ignores the fundamental premise that one with rights in this country must have access to the courts to vindicate those rights.

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[4] The Advance Parole Authorization (I-512L) stated on its face, Dr. Samirah "was authorized to depart the United States temporarily for bona fide business or personal reasons and intends to return to the United States to await the adjudication of his/her application for adjustment of status." App G, *infra*, 30a.

A. Dr. Samirah has substantial liberty interests at stake and is entitled to a hearing on the subject(s) of his exclusion.

Although Dr. Samirah is not physically present in the United States, he has substantial liberty interests and property interests in this country. Dr. Samirah lives in Orland Park, Illinois and has been living in the United States for the past fifteen years. At the moment of his departure, his wife, his children, his home, and his job were here in the United States. Moreover, he has constitutional rights to due process regarding his application for residency, filed prior to his departure, and his *de facto* removal from the country. He has those ties that afford him constitutional protection:

> This Court has long held that an alien seeking *initial* admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative . . . however, *once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.*

Landon v. Plascencia, 459 U.S. 21, 32-33 (1982) (emphasis added) (citations omitted); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (once an alien enters this country, his legal status changes); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (stating: "[i]t is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600-01 (1953) (holding that a returning alien is "entitled to due process without regard to whether or not, for immigration purposes, he is treated as an entrant alien . . . . His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him."); *United*

States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (stating: "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country").

The government argues below that Dr. Samirah lacks the connections to the United States that confer liberty interests sufficient to invoke constitutional protection. Relying on *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) and *Al Odah v. United States*, 321 F.3d 1134, 1140 (D.C. Cir. 2003), the government's position is that Dr. Samirah lacks "entitlement to constitutional protection" because he has "no presence in this country." *Al Odah*, 321 F.3d at 1140. The government characterizes Dr. Samirah as an "unadmitted alien" not in the custody of the United States and therefore outside the scope of due process. According to the government, the court must disregard the fact that Dr. Samirah established a prominent career with substantial ties to his community, and more importantly made a home for himself and his family in the United States. The government wholly ignores the fact that Dr. Samirah left this country with the government's permission and the expectation that he could return without jeopardizing his application for residency. The government argues that Dr. Samirah forfeits whatever rights he had because denial occurred outside the territorial boundaries of the United States. The government ignores the reality that Dr. Samirah left the United States with permission and was denied reentry at a preinspection station. This position cannot be reconciled with traditional notions of fair play and substantial justice. *See, e.g., Colding,* 344 U.S. at 600-01. The government may not deny him the benefits and protections of the Constitution unilaterally by barring him from his home without any formal notice, hearing, or other forum through which he can assert his rights.

B. Dr. Samirah's exclusion without notice and hearing violates due process and is a clear deprivation of his liberty interest.

The government excluded Dr. Samirah without reference to any lawful proceedings and under the auspice that revocation of advanced parole is within the province of the Executive Branch's authority to exercise discretionary power and is not subject to review. Irrespective of the Attorney General's discretionary power, Dr. Samirah retains his right to due process where government action encroaches upon his liberty interests. Without a forum, he can ascertain neither the exact reason he is being denied reentry into the United States nor the status of his application for adjustment. To withstand constitutional scrutiny under the Due Process Clause, procedure must govern the manner in which such discretion is exercised notwithstanding the fact that the ultimate decision may not be subject to review. Here, there is a fundamental absence of procedure. Dr. Samirah has been exiled from this country and denied access to our courts because the ultimate decision lay within the ostensible discretion of the executive power. Due process requires, at least in the case of a returning long-time resident of the United States who left temporarily with government permission, some kind of notice and opportunity to be heard before being excluded from the country. Exclusion without any process violates norms of fundamental fairness and constitutes manifest injustice.

III. THE EXECUTIVE MAY NOT DISREGARD A CONGRESSIONAL STATUTE.

The Seventh Circuit's decision presents, in addition to the difficult jurisdictional problems outlined above, grave matters relating to the separation of powers between the Executive and the Legislative Branches. The Seventh Circuit held that the Executive's actions were discretionary, even if the exclusion process adopted by the Executive agency was in contravention of the statute. *Samirah v. O'Connell*, 335 F.3d

at 348-49; App. A, *infra*, 6a. Particularly in light of the Constitution's clear grant of authority to Congress to control the immigration process, such a holding raises troubling separation of powers problems and should be reversed.

A. Congress has the Constitutional authority to regulate immigration.

The power of Congress to exclude or admit aliens has been held to flow both from sovereignty itself, *see, e.g., The Chinese Exclusion Case*, 130 U.S. 581 (1889), and from the power "[t]o establish an uniform Rule of Naturalization." U.S. Const., art. I, sec 8, cl. 4.; App. I, *infra*, 42a. This Court has long recognized "Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Kleindienst v. Mandel,* 408 U.S. 753, 766 (1972) (citation omitted) (internal quotation marks omitted).

While numerous cases have upheld the delegation of Congressional power to the Executive Branch, *see, e.g., United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 541 (1950) (Congress permitted Executive broad authority to exclude any alien deemed "prejudicial to the interests of the United States"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), no case has ever held that the Executive may act in direct contravention of a statute duly passed into law by Congress. The "plenary power doctrine" recognizes that Congress does not act alone in the immigration context, but the role of the Executive is to enforce the immigration laws passed by Congress, not to overturn those rules. "The power to exclude or to expel aliens... is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established." *Fong Yue Ting v. United States,* 149 U.S. 698, 713 (1893).

Congress takes the lead role in immigration matters, specifying by legislation the manner in which the Executive will act to regulate aliens. "Normally Congress supplies the

conditions of the privilege of entry into the United States." *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 543 (1950).

Dr. Samirah argued below that Congress had done so here, providing clear rules for the exclusion of individuals like Dr. Samirah, which the government ignored. This executive action was a constitutional encroachment upon Congressional authority. It is incumbent on the Executive to execute Congressional mandates; not to write its own immigration policy.

B. Congress did not create a new procedure for determining admissibility when it enacted INA § 235A.

Section 240 of the INA provides that "[u]nless otherwise specified in this chapter, proceedings under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." INA § 240(a)(3), 8 U.S.C. § 1229a(a)(3). In § 240 proceedings, "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1). This statutory language is the starting point of the analysis of this case. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). In the absence of a congressionally-established mechanism, other than § 240, for determining the admissibility of an alien whose advance parole has been revoked at an INS preinspection station, the government may not bar Dr. Samirah from the United States unless the government complies with the requirements of INA § 240.

The government claims to have found this "extra-Congressional" procedure in INA § 235A, 8 U.S.C. § 1225a, which reads, in pertinent part:

> (1) New stations. Subject to paragraph (5), not later than October 31, 1998, the Attorney General, in consultation with the Secretary of State, shall establish and maintain preinspection stations in at least 5 of the foreign airports that are among the 10 foreign airports which the Attorney General identifies as serving as last points of departure for the greatest numbers of inadmissible alien passengers who arrive from abroad by air at ports of entry within the United States. Such preinspection stations shall be in addition to any preinspection stations established prior to September 30, 1996.

App. J, *infra*, 69a. According to the government, because Dr. Samirah did not take a direct flight from Jordan to the United States and thereby passed through a preinspection station, he was entitled only to "preinspection review" under INA § 235A, 8 U.S.C. § 1225a.

As part of INA § 235A, Congress passed specific procedures for expedited removal. See, INA § 235(b), 8 U.S.C. § 1225(b) (expedited removal); INA § 235(c), 8 U.S.C. § 1225(c) (expedited removal of terrorists); INA § 238(b), 8 U.S.C. § 1228(b) (administrative removal of aggravated felons).[5]

Even a cursory comparison of INA § 235A with the three alternate procedures shows that INA § 235A is not meant to be a separate removal proceeding. Nothing in INA § 235A purports to provide any particular process at preinspection stations. INA § 235A includes no limitations, and as the government conceded below, it could summarily exclude even Lawful Permanent Residents or United States citizens

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[5] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302, 110 Stat. 3009, (Sept. 30, 1996), at the same time as INA § 235A.

(if the authenticity of their passport were doubted, for example) without any kind of hearing, arguing that U.S. citizens who were so excluded could bring actions in federal court to challenge this exclusion. Such a reading is plainly untenable. See, INA § 235A, 8 U.S.C. § 1225a. The text of the statute leaves no doubt that INA § 235A is a venue provision and does not alter either the substantive immigration law or the otherwise available procedures for determining inadmissibility.

By its terms, INA § 235A relates only to venue. It says nothing about the process to be provided at a preinspection station. 8 U.S.C. § 1225a. In the face of INA § 240(a)(3), 8 U.S.C. § 1229a(a)(3), which requires INA § 240 proceedings in the absence of statutory guidance to the contrary, the government argues that INA § 235A gives it, the Executive Branch, implicit authority to create an alternate process for excluding individuals from the United States. 8 U.S.C. § 1225a. This is both wrong and dangerous.

The clear language of Congress should end the discussion. *United States v. Silva*, 140 F.3d 1098 (7th Cir. 1998) (if the language of the statute is unambiguous, the court need not resort to the legislative history); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (agency's interpretation of statutes must give effect to the unambiguously expressed intent of Congress). However, examining the legislative history of both statutes, it becomes evident that the creation of preinspection stations does not supplant the requirements of INA § 240. 8 U.S.C. § 1229a. When Congress enacted INA § 240(a)(3)—simultaneously enacting INA § 235A—it clearly explained that INA § 240 would govern *all* removal proceedings except for the codified exceptions, none of which were invoked in Dr. Samirah's case. H.R. Conf. Rep. No. 104-828 104th Cong., 2nd Sess. 1996 (available at 1996 WL 563320

at *211).[6] The Conference report did not list INA § 235A as being among the alternate procedures to INA § 240. 8 U.S.C. 1229a. This legislative history is completely consistent with the text of the statute, wherein Congress expressly provided alternate procedures for determining removability when it wished to adopt such procedures.

It is undisputed that the government did not comply with the requirements of INA § 240 in Dr. Samirah's case. 8 U.S.C. § 1229a. Applicable regulations grant Dr. Samirah the right to a hearing, rather than the expedited removal procedures found in INA § 235(b). 8 U.S.C § 1225(b); 8 C.F.R. § 1.1(q) ("an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act"). The government's own policy manuals reflect this understanding:

> If the alien's parole was authorized pursuant to an Advance Authorization for Parole (Form I-512) which was issued while the alien was in the United States in order to allow the alien to return to this country, the expedited removal process does not apply and the alien should be placed in removal proceedings under section

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[6] The Committee Report on § 240 reads:

> Section 240(a) provides that there shall be a single proceeding for deciding whether an alien is inadmissible under section 212(a) or deportable under section 237 (formerly section 241(a)). This subsection shall not affect proceedings under new section 235(c) (aliens inadmissible on national security grounds), new section 238 (currently section 242A) (aliens convicted of aggravated felonies), or new section 235(b)(1) (arriving aliens, or aliens present in the United States without having been admitted or paroled, who are inadmissible for fraud or lack of documents). H.R. Conf. Rep. No. 104-828 104th Cong., 2nd Sess. 1996 (available at 1996 WL 563320 at *211).

240 of the Act as an inadmissible alien, regardless of the grounds of inadmissibility.

INS Field Inspector's Manual, Chapter 16.1 (2002), App. H, *infra*, 39a.[7]

Because there is nothing in INA § 235A, its legislative history or the legislative history of INA § 240 (or any case or administrative interpretation) that overrides the express statement of Congress that removal proceedings before an Immigration Judge constitute "the sole and exclusive procedure for determining whether an alien may be admitted to the United States," the government's interpretation of § 235A must be rejected. *Navarro-Aispura v. INS*, 53 F.3d 233, 235 (9th Cir. 1995) (courts are not obligated to accept an agency's interpretation that is 'demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute."). The Seventh Circuit erred in failing to address these substantive legal arguments below.

C. The Executive does not have the discretionary authority to disobey the statutorily expressed will of Congress, and such actions are not beyond the jurisdiction of the Judiciary.

The Seventh Circuit declined to rule upon the Constitutional or statutory arguments raised by Dr. Samirah, holding instead that the Executive's decision to exclude Dr. Samirah

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[7] The courts have acknowledged that when an alien who has been granted advance parole seeks reentry, he must be given notice and an opportunity to be heard, and his inadmissibility and removability must be decided by an Immigration Judge pursuant to INA § 240: "With a copy of his advance parole document in hand, Balogun traveled to Nigeria and stayed for a period of four weeks. Upon his attempted return on January 23, 1999, Balogun was immediately detained and served with a Notice to Appear. As noted, Balogun's prior drug and larceny charges made him an 'inadmissible' alien. Pursuant to 8 U.S.C. § 1229a [INA § 240], the INS commenced removal proceedings." *Balogun v. INS*, 304 F.3d 1303, 1309 (11th Cir. 2002).

was beyond the jurisdiction of any district court, because it involved the exercise of discretionary power. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). Here, Congress has specified removal procedures which the Executive seeks to bypass.

This case therefore presents a significant test of the Executive's power to disregard a congressionally-mandated statute regarding exclusion. The question presented is whether the Executive possesses sufficient inherent power to contravene a valid immigration statute. An affirmative answer to this question would represent a sharp departure from the logic and spirit of *Knauff* and *Fong Yue Ting*. At a minimum, such a conclusion should be reached on the merits and not by a finding that the courts are disabled from ruling upon the matter.

IV. HABEAS JURISDICTION IS PROPER WHERE AN INDIVIDUAL RETURNING TO HIS DOMICILE IS EXCLUDED IN VIOLATION OF THE LAWS AND CONSTITUTION.

In its opinion, the Seventh Circuit states that the Northern District of Illinois has no jurisdiction over the Attorney General or the Interim Director for Interior Enforcement at the Bureau of Immigration and Customs Enforcement in Chicago because (1) Dr. Samirah was not in "custody" of the United States government; and (2) neither respondent had immediate physical control over Dr. Samirah. On both

issues, the Seventh Circuit has departed from established law of other courts of appeals and admittedly created a circuit split.

A. Dr. Samirah was in custody where his exclusion prevented him from returning to his lawful domicile.

Under the reasoning of the *Samirah* court, once an individual has been expelled from the United States—whether illegally or not—that individual ceases to be in custody. But this means that if the government acts with dispatch, it can prevent any alien from ever challenging the validity of exclusion by preventing the alien from filing a habeas petition while still within the geographic boundaries of the United States. With this power, the government can deport anyone without process and without any possibility of judicial correction. Such a proposition cannot stand.[8]

In this case, it is undisputed that Dr. Samirah was residing in the United States and had applied for permanent residency; he departed the United States holding an advance parole document issued by the government which stated that he was "authorized to depart the United States temporarily for bona fide business or personal reasons and intends to return to the United States to await the adjudication of his/her application for adjustment of status." App. H, *infra*, 30a. The Seventh Circuit held that Dr. Samirah was not in custody upon being excluded, because he could "wander the earth, so long as his wanderings do not lead him to the United States. . . . [which]

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[8] Such a proposition presents a serious Suspension Clause issue. "Even assuming that the Suspension Clause protects only the writ as it existed in 1789," *see INS v. St. Cyr*, 533 U.S. 289, 304 (2001), the Habeas Corpus Act of 1769, 31 Car. II. c. 2., prohibited, among other things, sending an inhabitant or resident of England to "Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions." *Id.* at XII, 2; *see also* 3 William Blackstone, Commentaries *137.

puts him on par with the billions of other non-U.S. citizens around the globe who may not come to the United States." *Samirah v. O'Connell*, 335 F.3d at 549; App. A, *infra*, 7a. But Dr. Samirah is not on par with the billions of people who have never visited the United States. He is a longtime resident of the United States, with a pending application for residency, who traveled outside the United States holding permission from the U.S. government to return. Such a holding ignores decades of this Court's jurisprudence, which holds that an immigrant's process rights are assessed on a sliding scale: "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Landon v. Plasencia*, 459 U.S. 21, 34, 103 S. Ct. 321, 330, 74 L.Ed.2d 21 (1982).

The Seventh Circuit's holding conflicts directly with cases from other circuits which have permitted habeas actions where an individual has been wrongly deported and was prevented by the circumstances of the government's actions from filing that action while in the United States. *See, e.g.*, *Subias v. Meese*, 835 F.2d 1288, 1289 (9th Cir. 1987). Based on this Court's holding in *Jones v. Cunningham*, 371 U.S. 236 (1962), the Ninth Circuit has interpreted "custody" broadly to include the restriction of an alien from entering the United States. *Subias*, 835 F.2d at 1289. Indeed, the *Samirah* court readily acknowledged that *Samirah* created a conflict between the circuits. *Samirah v. O'Connell*, 335 F.3d at 550 n.6; App. A, *infra*, 8a.

The control that the United States government now exercises over Dr. Samirah is by definition a restraint on his liberty, and thus Dr. Samirah is in custody for purposes of eligibility to claim habeas relief. The Ninth Circuit adopts this definition, while the Seventh Circuit has not, creating a circuit split which only the United States Supreme Court can resolve.

B. Dr. Samirah has named proper custodians as respondents, and the Seventh Circuit and Northern District of Illinois have personal jurisdiction over both.

A circuit split also exists over the issue of a court's jurisdiction to hear a habeas claim based on the petitioner naming the proper respondent or custodian. "The habeas corpus statute, 28 U.S.C. § 2241(a), permits the writ to be granted by district courts 'within their respective jurisdictions.' The writ . . does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody . . . Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian." *Gherebi v. Bush, et. al.*, No. 03-55785, 2003 U.S. App. LEXIS 25625, at *54-55 (9th Cir. Dec. 18, 2003) (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 93 S. Ct. 1123 (1973)). In his petition, Dr. Samirah named Attorney General Ashcroft and Cynthia O'Connell, Interim Director for Interior Enforcement at the Bureau of Immigration and Customs Enforcement in Chicago as respondents.[9] District Court Judge Moran, sitting in Chicago, Illinois, clearly had jurisdiction over Cynthia O'Connell, the Interim District Director in Chicago. The district director had the power to reverse the prior decision of the agency and to permit Dr. Samirah's return to the United States. Dr. Samirah was in custody because he was precluded from returning to his

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[9] Since the institution of this action, the Immigration and Naturalization Service was divided into several constituent parts, and these agencies were moved from the Department of Justice to the Department of Homeland Security. The Secretary of the Department of Homeland Security is now the head of the successor agencies to the INS and would properly be named as a respondent in this matter. However, for purposes of terminological convenience, Dr. Samirah will refer to the Attorney General, who was the Respondent named in the complaint.

home. The lifting of parole revocation would free him from that unlawful restraint and permit his return to the United States. Because that action is within the power of the district director, Dr. Samirah continues to be within her custody for purposes of habeas corpus.

Similarly, the Attorney General was clearly within the jurisdictional reach of the district court, sitting in Illinois, because the Illinois long-arm statute grants such jurisdiction, and the Attorney General, through his agents, had "minimum contacts" with the State of Illinois. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988); *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 940 (7th Cir. 2000). "A court has personal jurisdiction in a habeas case so long as the custodian can be reached by service of process." *Gherebi v. Bush, et. al.*, No. 03-55785, 2003 U.S. App. LEXIS 25625, at *54-55 (9th Cir. Dec. 18, 2003). Even if the local district director lacked authority over the INS preinspection station located abroad, the Attorney General clearly did have the ability to permit Dr. Samirah's return to the United States. Under these facts, it would have been appropriate for a district court to treat the Attorney General as custodian, even if he did not have day-to-day control of Dr. Samirah. *See, Ex Parte Hayes*, 414 U.S. 1327, 1328-29 (1973).

A number of circuits have recently considered the propriety of naming a cabinet-level officer as respondent in an immigration case. While it is plain that a cabinet-level officer may not ordinarily be named in a habeas petition, the First, Second, Sixth, and Ninth Circuits have each found that the Attorney General may be properly named as a respondent in habeas proceedings under certain circumstances. *See, e.g., Gherebi*, No. 03-55785, 2003 U.S. App. LEXIS 25625, at *54-59 (finding jurisdiction over Secretary of Defense where aliens were detained under his authority outside the country, citing *Strait v. Laird*, 406 U.S. 341, 345 (1972), *Braden v.*

30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S. Ct. 1123 (1973)); *Armentero v. INS*, 340 F.3d 1058, 1064 (9th Cir. 2003) (holding Attorney General proper respondent to immigration habeas petition, stating, ". . . *Braden* necessarily reaffirmed the earlier rulings that the custodian need not be the person with immediate physical control over the detained prisoner while imprisoned...the concept of custodian is a broad one that includes any person empowered to end restraint on a habeas petitioner's liberty, not just the petitioner's on-site, immediate physical custodian."); *Padilla v. Rumsfeld*, No. 03-2235, 2003 U.S. App. LEXIS 25616 *25 (2nd Cir. Dec. 18, 2003) (jurisdiction over Secretary of Defense where U.S. citizen moved from New York to South Carolina; "[w]hen habeas petitions are brought by persons detained for reasons other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent"); *Vazquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000) (Attorney General was "normally" a proper respondent, noting possibility of "extraordinary circumstances"); *Roman v. Ashcroft*, 340 F.3d 314, 324-325 (6th Cir. 2003) (immediate custodian rule generally applies to alien habeas corpus petitioners, but noting that "[i]n light of the degree of control which the Attorney General has over an alien's immediate custodian, we believe that it may be appropriate to recognize the Attorney General as a proper respondent to an alien's habeas corpus petition under certain circumstances.")

None of the courts of appeals—other than the *Samirah* court—have even remotely suggested that an individual who was "in custody" for purposes of habeas would be unable to bring an action anywhere because of the absence of a local custodian. Such an approach would clearly be contrary to *Ex Parte Endo*, 323 U.S. 283 (1944), where the Court held that the district court maintained jurisdiction over the petition for habeas corpus even though the petitioner was discharged from custody. The Supreme Court held that "the court may

act if there is a respondent within reach of its process who has custody of the petitioner," stating that there was no suggestion that there was no one within the jurisdiction who is responsible for the detention of the petitioner. *Ex Parte Endo*, 323 U.S. at 306. The Court held that the appropriate respondent is the person with the ability to release the petitioner from custody, which in this case was not a person within the immediate location of the petitioner. *Id.* at 306-07. This suggests that it is not necessary for the custodian to be within the physical presence of the petitioner in order to be the appropriate respondent.

The Seventh Circuit went out of its way to foreclose any opportunity for Dr. Samirah to seek review of the statutory and constitutional arguments he raised. Failing even to note this Court's longstanding presumption in favor of some review of constitutional questions, the Seventh Circuit held that Dr. Samirah could be excluded from the United States—in violation of the statute and the Constitution—without any review in any court.

While it may be possible for Congress to strip the courts of the power to review certain constitutional questions—this is a question the Court has never answered—where the jurisdiction-stripping statute does not articulate an intent to eliminate constitutional review, and indeed, applies on its face to discretionary decisions only, such an opinion is clearly contrary to this Court's precedent. The decision should be reversed.

V. THE IMPORTANCE OF THIS CASE

A. Importance of this Case for Immigration Law

According to the most recent statistics, approximately 966,000 individuals are awaiting decisions from the government on their applications for permanent residency. U.S. Department of Homeland Security, Yearbook of Immigration Statistics, 2002, U.S. Government Printing Office:

Washington, D.C., 2003, at 6. Tens of thousands of these individuals seek and obtain "Advance Parole" each year so that they may travel outside the United States while their applications are pending. *Id.* at 90. When these aliens return to the United States via preinspection stations—with the permission of the United States government—the government claims for itself the unilateral right to deny them—without review or response—the right to return to this country or to obtain a decision on their application. The government's refusal to permit aliens to return to the United States necessarily results in their pending application being denied, because the applicant will not be present for the applicant interview. 8 C.F.R. § 245.6.

The scope of the government's claims here is breathtaking. The Executive Branch claims the power to exclude (without hearing or appeal) not only individuals applying for permanent residency, such as Dr. Samirah, but individuals who are already permanent residents, or even U.S. citizens (conceding that citizens barred at preinspection stations could seek judicial review). This claim marks a significant expansion of the power claimed by the Executive Branch. Such a claim is clearly contrary to this Court's holding in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600-01 (1953) (returning permanent resident "entitled to due process without regard to whether or not, for immigration purposes, he is treated as an entrant alien"). It is contrary to the statute, which provides the "sole and exclusive" means by which orders of removal or findings of inadmissibility may be entered. 8 U.S.C. § 1229a(a)(3). For the courts not only to countenance such a significant change, but to find themselves entirely without jurisdiction even to consider statutory or constitutional questions, is a matter of great import and would be enough to merit this Court's attention in its own right.

B. Relation of this Case to Al-Odah and Rasul, Currently on this Court's Docket.

The Court recently granted certiorari to resolve difficult jurisdictional issues relating to non-citizens detained at the U.S. Naval Base in Guantanamo Bay, Cuba. *See Al Odah v. United States*, 124 S. Ct. 534, 535 (November 10, 2003) (No. 03-343); consolidated with *Rasul v. Bush*, 124 S. Ct. 534 (2003). These two consolidated cases may directly impact on this case, as they present jurisdictional issues strikingly similar to those presented herein.

The consolidated cases of *Rasul* and *Al-Odah* present both parts of the jurisdictional arguments raised in the complaint in this case. *Rasul* was brought as a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241; *Al-Odah* was brought under several other jurisdictional statutes, including 28 U.S.C. § 1331 in conjunction with the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, and 28 U.S.C. § 1361 Mandamus. The jurisdictional bases urged in this case include habeas corpus under 28 U.S.C. § 2241, federal question jurisdiction under 28 U.S.C. § 1331, in conjunction with the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq*, and Mandamus under 28 U.S.C. § 1361.

There are, however, important distinctions as well. As the government has observed in its brief to the court in *Al-Odah*, "the Guantanamo detainees, just like the prisoners in *Eisentrager*, are aliens with no connection to the United States." Brief for Respondents in Opposition, *Rasul v. Bush*, *Al-Odah v. United States*, No. 03-334, 03-343, at 12. In *Eistentrager*, the Petitioners (like the Petitioners/Plaintiffs in *Rasul/Al-Odah*) "at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950).

Dr. Samirah, by contrast, very clearly was within this country at a "relevant time." Unlike the detainees in *Al-Odah* and *Rasul*, Dr. Samirah was domiciled in the United States at the time he filed his Complaint and Petition. Although he was physically outside the boundaries of the United States at the time of the filing of this action, due to the government's improper actions, he had not abandoned his domicile within U.S. borders. Because Dr. Samirah had a long, lawful residence within the United States and a pending application for permanent residency, he had due process rights relating to his exclusion from the country.

It may be that the Court's resolution of the jurisdictional matters raised by *Al-Odah* and *Rasul* will be dispositive of jurisdictional issues raised in this case, and will support remand to the Court of Appeals for reconsideration in light of that decision. In the universe of cases brought by detained aliens, *Al Odah/Rasul* lies beyond *Samirah*, further from the core of cases for which jurisdiction clearly exists. A finding that jurisdiction exists in *Al-Odah/Rasul* would likely compel the same result in *Samirah*, and result in remand.

This case, however, involves grave constitutional questions not present in *Al-Odah*, given that Dr. Samirah was domiciled within the country and residing in Illinois with his wife and children at the time of his exclusion. Regardless of the answer given by the Court to the jurisdictional questions raised in *Al-Odah* and *Rasul*, this case would constitute an appropriate vehicle for resolving the several conflicts that have arisen in the courts of appeals relating to the situation of non-citizens wrongfully deported or excluded from the United States.

CONCLUSION

For the foregoing reasons, Dr. Sabri Samirah respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

CHARLES ROTH
MIDWEST IMMIGRANT AND
HUMAN RIGHTS CENTER
208 South LaSalle Street
Suite #1818
Chicago, Illinois 60604
(312) 660-1613

MARK A. FLESSNER
Counsel of Record
CARIN S. RIEKES
DAVID B. SINGER
CHRISTOPHER A. WALLACE
SONNENSCHEIN NATH &
ROSENTHAL LLP
8000 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-8000

Counsel for Petitioner